Supreme Court, U. S.
FILED
OCT 3 1975
MICHAEL RODAK, JR., CLERK

No. 75-183

In the Supreme Court of the United States

OCTOBER TERM, 1975

JAMES R. COSON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-183

JAMES R. COSON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioners seek review of the decision in this case upholding the enforcement of an internal revenue summons to produce corporate books and records. The district court ordered the summons enforced (Pet. App. 4a-5a), and the court of appeals affirmed (Pet. App. 1a-3a).

After briefs had been filed in the court of appeals and prior to oral argument, the Regional Counsel of the Internal Revenue Service recommended to the De-

partment of Justice that criminal proceedings for violation of the internal revenue laws be instituted against petitioner Coson and two of his corporations. Subsequently, however, the Department of Justice returned the case to the Internal Revenue Service for further investigation.

Petitioners moved in the court of appeals to enlarge the record in order to argue that the Internal Revenue Service's recommendation for criminal prosecution subsequent to the issuance of the summons rendered the summons unenforceable. The court of appeals denied the motion because the matter had not been presented to the district court. The basis upon which petitioners seek certiorari is their assertion that the internal revenue summons is unenforceable because (Pet. 2) its "sole purpose * * * is to aid prosecution of the criminal case * * *."

1. In *Donaldson* v. *United States*, 400 U.S. 517, 536, this Court held that "an internal revenue summons may be issued in aid of an investigation if it is issued in good faith and prior to a recommendation for criminal prosecution." The summons in this case meets the *Donaldson* test since it was issued prior to the Service's recommendation for prosecution.

Contrary to petitioners' assertion (Pet. 10), there is no "conflict and confusion" with respect to the question whether a summons can be enforced if the Internal Revenue Service recommends prosecution after its issuance but before its enforcement. Six circuits have held that a summons is enforceable under such circumstances. See *In re Magnus, Mabee & Reynard, Inc.*, 311 F.2d 12, 14-15 (C.A. 2), certiorari denied, 373 U.S. 902; *United States* v. *Weingarden*, 473 F.2d 454, 461 (C.A. 6); *United States* v. *Held*, 435 F.2d 1361, 1364 (C.A. 6), certiorari denied, 401 U.S. 1010; *United States* v. *Moriarty*, 435 F.2d 347, 348 (C.A. 7); *United States* v. *Giordano*, 419 F.2d 564, 568, n. 5 (C.A. 8), certiorari denied, 397 U.S. 1037; *United States* v. *Cromer*, 483 F.2d 99, 101 (C.A. 9); *United States* v. *Hodgson*, 492 F.2d 1175, 1177 (C.A. 10).

While there are dicta in *United States* v. *Billingsley*, 469 F.2d 1208, 1210 (C.A. 10), and in *United States* v. *Monsey*, 429 F.2d 1348, 1351 (C.A. 7), suggesting that the commencement of a criminal proceeding subsequent to the issuance of a summons should be considered in determining its enforceability, both the Tenth and Seventh Circuits subsequently in *United States* v. *Hodgson*, *supra*, 492 F.2d at 1177, and in *United States* v. *Moriarty*, *supra*, 435 F.2d at 349, allowed the enforcement of a summons after criminal tax indictments had been returned. In *Moriarty*, the Seventh Circuit explained that its decision in *Monsey* was not to be read to prohibit enforcement of an internal revenue summons in such circumstances. As that court noted, a recommendation for prosecution after the issuance of a summons does not, by itself, establish that the summons was issued solely in furtherance of the criminal prosecution as long as the civil purpose for investigation continues. See *United States* v. *Moriarty*, *supra*, 435 F.2d at 349.[1]

---

[1] Petitioners' reliance (Pet. 8, 9, 12) upon *United States* v. *Zack*, 375 F. Supp. 825 (D. Nev.), and *United States* v.

Petitioners further argue (Pet. 7-8) that this Court's denial of certiorari in *Kyriaco* v. *United States*, 401 U.S. 922, with leave to raise the claim of the subsequent criminal investigation in the lower courts, establishes that the summons in this case should not be enforced. But the Court's action in *Kyriaco* does not suggest that an intervening recommendation for criminal prosecution renders a summons unenforceable. At most, this Court simply allowed the petitioner in that case an opportunity to present a subsequent factual development to the district court. See *United States* v. *Weingarden*, *supra*, 473 F.2d at 461, n. 12.

Since the lower courts have not yet passed upon petitioners' claim, there is no basis for review by this Court at this juncture. Petitioners are at most en-

---

Kyriaco, 326 F. Supp. 1184 (C.D. Cal.), is misplaced. In *Zack*, the district court found that a search of the taxpayer's offices pursuant to a warrant one week before the issuance of the summons demonstrated that the sole object of the investigation was to gather data for a criminal prosecution. However, this decision was recently reversed by the court of appeals (No. 74-2467, July 16, 1975). That court observed that if there was a proper civil investigation, the search warrant would not have been issued to further a solely criminal investigation and that the district court therefore erred in concluding that the issuance of a search warrant was equivalent to an indictment or a recommendation for prosecution. Moreover, although the taxpayer prevailed in *Kyriaco*, he subsequently complied with the summons, thereby rendering the case moot. See *United States* v. *Weingarden, supra*, 473 F.2d at 461, n. 12.

titled to raise the point in the district court as the taxpayer did in *Kyriaco*.[2]

Finally, if, as petitioners urge, an internal revenue summons would be rendered unenforceable by a recommendation for criminal prosecution made subsequent to its issuance, taxpayers would be encouraged to delay compliance as long as possible by resisting enforcement in the courts. Because of the statutes of limitations with respect to criminal tax prosecutions, the Internal Revenue Service would often be compelled to make a recommendation to the Department of Justice for criminal prosecution subsequent to its issuance of a summons but before its enforcement by the courts. Taxpayers should not be enabled thus to defeat the enforcement of the Service's summonses by means of resistance and delay.[3]

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1975.

---

[2] Subsequent to this Court's denial of certiorari in *Kyriaco*, however, the Ninth Circuit in *United States* v. *Cromer*, 483 F.2d 99, rejected the contention advanced by petitioners here.

[3] Moreover, the documents sought by the summons here are corporate books and records which are not eligible for the Fifth Amendment privilege against self-incrimination. Hence, even if petitioner were indicted, such records could be obtained by a grand jury or trial subpoena. See *Bellis* v. *United States*, 417 U.S. 85, 88-90, 100, and cases cited therein.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1975 593870 58